No. 17382

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE DUVALCOURT WALKER and IRVING GOLDHEIMER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

I.
STATEMENT OF JURISDICTION.

Appellants Irving Goldheimer and Eugene Duvalcourt Walker together with Bryce Wilson, Nicholas Rodriquez Medina and Francisco Ochoa Mendez were indicted by a Federal grand jury for the Southern District of California on September 28, 1960, in two counts for violations of Title 21 United States Code Sections 174 and 176. The first count charged that beginning on or about July 13, 1960, and continuing to August 30, 1960, the appellants together with the other defendants named therein conspired together to knowingly and unlawfully receive, conceal, transport and facilitate

the concealment and transportation and sell and facilitate the sale of heroin which the defendants knew would have been imported into the United States contrary to United States Code Title 21, Section 173; to knowingly smuggle and clandestinely introduce into the United States from Mexico, heroin with intent to defraud the United States which merchandise should have been invoiced prior to importation into the United States in violation of United States Code Title 21, Section 174. The second count charged that beginning on or about July 13, 1960, and continuing to August 30, 1960, the appellants together with the other defendants named therein conspired to knowingly and unlawfully receive, conceal, transport and facilitate the concealment and transportation and sell and facilitate the sale of marihuana which the defendants knew would have been imported into the United States contrary to law; to knowingly and willfully smuggle and clandestinely introduce into the United States from Mexico marihuana with intent to defraud the United States which merchandise should have been invoiced prior to importation into the United States in violation of United States Code Title 21 Section 176.

The appellants pleaded not guilty to both counts and after a trial before a duly constituted jury which commenced on November 2, 1960, and concluded on November 7, 1960, the appellants were found guilty on both counts.

The appellants have filed notices of appeal and though they are represented by different counsel and have submitted separate opening briefs, it is believed that in view of certain common questions which are raised in both briefs, needless duplication in argument

can be avoided if one reply brief is submitted by the appellee to respond to the contentions raised in the appellants' two opening briefs.

The jurisdiction of the District Court was based upon Title 18, United States Code Section 3231 and this Court has jurisdiction to entertain the appeal and review the judgments in question under the provisions of Title 28 United States Code Sections 1291 and 1294.

II.
STATUTES INVOLVED.

United States Code Title 21 Section 174 provides in part as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

United States Code Title 21 Section 176a provides in part as follows:

"§176a. Smuggling of marihuana; penalties, evidence; definition of marihuana.

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

III.
STATEMENT OF FACTS.

There are set forth below a summary of the principal evidence upon which the Government relies to support the convictions of the appellants in this case:

James Ralph Webster, a special employee of the Federal Bureau of Narcotics, identified appellant Goldheimer in the courtroom and testified that he met him at a jail in Long Beach, California, in the latter part of May 1960 [Tr. 5, 11],[1] that Goldheimer told him that he had been to Mexico, that he had narcotics sources there and that he had previously imported marihuana from Mexico to New York and that he had just returned from Mexico not too long prior to his being arrested [Tr. 13], that he had an associate or friend who had a boat and that they were intending to import a large quantity—200 kilos—of marihuana "up to this area" and that they had "the contacts on the Mexican side 'all lined up'" [Tr. 14]. Webster further testified that he met Donald Wilets, an agent of the Federal Bureau of Narcotics, on June 3, 1960, and on June 23, 1960 [Tr. 18] and outlined to him the conversations he had with Goldheimer, telling Wilets that he had been approached by a man (Goldheimer) who had a source of supply and a method of transportation for importing narcotics into the United States [Tr. 17-19].

On June 29, 1960, Webster met Goldheimer and Walker and Goldheimer asked him if he "wanted to see the boat", and stated that he and Walker were going down to fuel the boat and Webster could see it [Tr.

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[1]Tr. refers to the Transcript of Proceedings in the trial court.

21]. Webster stated that narcotics and the importation of narcotics were a topic of conversation at this meeting just as on each of his meetings since "we came together for that purpose" [Tr. 23]. The three individuals drove to Newport where the yacht of which Walker was captain was berthed and they arrived there between 11 P.M. and midnight and stayed until 7 the next morning [Tr. 24]. While on the yacht Goldheimer showed Webster a lot of charts and told him that he and Walker had one chart on which they had drawn out a course to some point below Ensenada and had worked out a landing area where "a transshipment could be made of the narcotics on board the vessel" [Tr. 25]. That night during a conversation with Walker, discussing the method of shipment of marihuana, Walker stated that the best plan, and what he intended to do, was to have it wrapped in water proofed packages, compressed and put into sail bags which are canvas bags that are put on decks when the ship is at sea and that are always empty. Walker also stated that he was not absolutely sure of the customs formalities in returning from a foreign run on a yacht and that he was going to check into it [Tr. 26]. There were other conversations that night between Walker, Goldheimer and Webster in which the topic of narcotics and the transportation thereof "was the usual topic" (*ibid*). In discussing finances Goldheimer stated that he had some money on deposit with a Bryce Wilson in Guadalajara [Tr. 27]; that if their venture was successful Goldheimer, Walker, Wilson and Webster were each to receive 25 per cent of the total profits above expenditures and that Webster was to put some money into the enterprise depending on the

final amount of narcotics that was to be handled [Tr. 27, 28].

On June 27, 1960, Webster suggested to Goldheimer that he meet his financicial backer. Goldheimer had previously expressed a desire to meet him [Tr. 30] and on July 13, 1960, Webster and Wilets met Goldheimer at the Scandia Restaurant on the Sunset Strip [Tr. 31] and Goldheimer told Wilets that there was narcotics available through his sources and that a source of transportation, a yacht, was readily available [tr. 32].

On July 14, 1960, Goldheimer, Walker, Webster and Wilets, met together at a restaurant and then went for a ride [Tr. 34] during which Goldheimer asked Webster and Wilets how the plan "looked" and Walker asked if Wilets was going to "front any money" [Tr. 35].

On July 28, 1960, Webster met Goldheimer who said he would be ready to go to Mexico the following day and requested Webster to make all the arrangements [Tr. 36]. These were accomplished and on the next day Wilets drove Webster out to pick up Goldheimer and the party then drove to the airport. The conversation in the car concerned bringing the thing "to a head" and obtaining a clear commitment down below on what they were supposed to get [Tr. 38]. Webster and Goldheimer debarked at Guadalajara but they could not find Bryce Wilson there and Goldheimer then left Guadalajara and flew to Puerto Vallarta [Tr. 39] and returned the following day with Wilson [Tr. 41]. Goldheimer told Webster that Wilson had spent his money and that they would go to the Jalisco State Jail in Guadalajara the following day to meet with one of the sources of supply [Tr. 42]. They

went to the prison where they met an inmate named Bonifacio Talaveras [Tr. 44] with whom they discussed the availability and the prices of marihuana and the availability of heroin. Talaveras said that marihuna was available in a week or two but that he didn't know about the heroin but that he would send someone out to see about it [Tr. 46, 47]. A runner sent out by Talaveras returned with an individual named Ramundo who stated that there was a kilogram of heroin available in a week or two and that the price would be 10,000 American dollars [Tr. 49, 50] which Webster said was too high but Goldheimer and Wilson said that it was a fair price and Goldheimer also stated "well that's the price its always been" [Tr. 50]. Webster and Goldheimer returned to their hotel with Wilson and when Goldheimer went with Wilson to the hotel at which Wilson was stopping, Webster called Wilets and outlined what had happened in the jail [Tr. 51, 52]. Webster, Goldheimer and Wilson returned to the jail a few days later and Webster stated that $10,000 would be acceptable but that he would want a firm delivery date and Ramundo stated that there would be a kilo available on August 14 which could be held until August 21 [Tr. 53, 54]. Goldheimer suggested that the heroin and the marihuana should be bought at one time for one delivery on the yacht and Talaveras said that the marihuana would be available at the same time as the heroin. Ramundo then gave Wilson, Webster and Goldheimer the name and address of a man outside of the prison whom he said was the heroin and opium connection [Tr. 54]. Ramundo's "connection" was a man named Alfredo Medina and his name and address was written by Ramundo on a slip of paper which he gave to Wilson [Tr. 54].

After leaving the jail the plans for delivery were discussed in conversations held at the Fenix Hotel in Guadalajara by Wilson, Goldheimer and Webster [Tr. 57] and Wilson said he would go back to his home in Yalapa since the heroin was not immediately available and that he would return to Guadalajara on August 14 at which time he would meet Medina in San Pedro, Tlaquepaque, to get a sample of the heroin and that he would then forward a sample to Webster in the United States so that there would be some token of good faith and ability of supply on the part of the people they were dealing with [Tr. 59]. Goldheimer said that nothing should be done about the marihuana until the heroin was obtained so that it could be put together in one package and one delivery could be made. It was agreed that Goldheimer and Webster would return to Guadalajara on August 21 after having received the heroin sample in the United States and that in the meantime Wilson would remain in Guadalajara and see about getting the marihuana together and starting to package it. Goldheimer said he would contact Walker to arrange for a final delivery of the heroin and the marihuana by them to Walker in Ensenada [Tr. 60]. Webster stated that as to the payment for their trip to Mexico, Goldheimer had given him a $100 bill but said that he was a little short and Webster paid the remaining $37.00 for the ticket and that in addition he had purchased lunch for Goldheimer several times in Mexico but that he had given him no other funds [Tr. 61]. Webster and Goldheimer returned to the United States together on August 4 and they were met at the airport by Wilets [Tr. 63]. Goldheimer told Wilets that arrangements had been made to pick up both heroin and marihuana in Guadalajara on August

21 and that it had been decided to make it a package deal so that the heroin would not be imported without the marihuana and the price was $10,000 in American dollars [Tr. 64].

Another meeting was held between Webster, Walker, Goldheimer and Wilets on August 10 and after a cup of coffee in a restaurant [Tr. 65] they drove around and discussed the arrangements that had been made. Due to the fact that Goldheimer had to make a court appearance and would not be able to return to Guadajara on August 21, alternate arrangements had to be made and it was decided that Webster and Wilets would go to Mexico to receive delivery. Webster could then return to the United States on August 22 and Goldheimer could follow them down in order to transport the narcotics from Guadalajara to Ensenada [Tr. 66]. During the conversation Wilets wanted to know how the marihuana was to be packed and Walker said it was to be packed as tightly as possible and wrapped in water proofed containers so that just in case it was necessary to kick them overboard, it could be done although he (Walker) envisioned no problem. Walker also stated that he would be ready on 24-hour notice to meet Webster or Wilets or any of the co-conspirators at a pick-up point in Lower California. He asked for an advance of $250 to defray the costs of renting a boat but he did not receive this sum. On August 18 Webster returned to Mexico driving to Tijuana with Wilets, then flying on to Guadaljara alone. But when he reached Guadalajara he did not find Mr. Wilson [Tr. 67] so he left by plane the next day for Puerta Vallarta where he located Wilson. Wilson would not return to Guadalajara with Webster as he stated that

he had to go to Yalapa and Webster then accompanied Wilson and his wife to that town. Webster inquired why nothing had been done and why no sample had been received and Wilson stated that he did not have the funds to stay in Guadalajara but that he had gone there anyway and found that the heroin which he thought was available was not available and that he had met with Medina concerning this and that he was returning to Yalapa to wait for a letter from Medina stating when the heroin was available [Tr. 68-69]. Wilson returned to Guadalajara with Webster where they met Agent Chappell of the Federal Bureau of Narcotics. Wilson told Chappell that he was sorry the deal hadn't gone off as originally scheduled and that he didn't think that it was quite finalized enough to convince the people from whom they were buying [Tr. 69]. Wilson said that now that Chappell and Webster were both back on the scene he (Wilson) would get everything rolling at once. Wilson suggested that he and Webster go back to the penitentiary to see Talaveras who was the contact man for Medina so that they could once again talk to Medina. Talaveras sent them to Medina and Wilson, Chappell and Webster had a discussion with Medina at a bar in Guadalajara [Tr. 70] in which Medina stated that he was sorry he hadn't made the delivery but that he didn't quite believe the whole thing was real and that he thought that somebody was just trying to get a kilo of heroin reserved in case he could raise the money; but that since the parties were on the scene Medina would be able to supply the heroin on one week's notice. Wilson inquired whether it would be possible to get the heroin before one week but Medina said they would have to get the opium from the fields and process it through their laboratory

to make the heroin and that it would take about a week [Tr. 71]. Wilson asked about the marihuana and Medina said that that was no problem and Wilson placed an order for 500 kilos which was to be delivered at the same time as the heroin. A meeting was arranged for two days later so that Chappell, Wilson. Webster and Medina could talk to the man who was the grower or rancher who supplied the opium. His name was Ochoa Mendez and the meeting was held at a hotel in Guadalajara at which meeting Wilson was not present [Tr. 72]. At this point counsel for Goldheimer objected to the introduction of evidence of the conversation at this meeting as not binding upon any one who was absent and the Court stated that it could only be binding upon anyone who was absent if it was connected up to show a conspiracy and that the indictment did allege that Medina and Mendez were members of the conspiracy [Tr. 73]. At the meeting Mendez told Chappell that he had the opium but that it would take about a week to make it into heroin. Chappell got into a disagreement with Medina and Mendez because they wanted Chappell, Wilson and Webster to go to Uruapan which was an Indian village about 100 miles from Guadalajara way up in the mountains because they were not too sure that the others were not Federal agents and they were worried about Federal agents in Guadalajara and also did not want to take the chance of being highjacked by the others. Chappell on the other hand took the position that he did not want to take the chance of being in a remote Mexican village with the money [Tr. 75]. It was finally decided that Wilson would go with Medina and Mendez to Uruapan and would accompany them to the ranch to inspect the narcotics. At this point there was an ob-

jection by defense counsel that the proceedings testified to were hearsay as to the appellants and the Court again gave cautionary instructions on the question of conspiracy [Tr. 76, 77]. At the meeting the delivery date was set for August 28 and Chappell and Webster were to wait in Guadalajara for a telephone call from Wilson which came late on the night of the 28th [Tr. 78].

On that night Chappell and Webster accompanied by Mexican narcotics agents drove to Uruapan. On the morning of the 30th they met Wilson in Uruapan and Wilson told Chappell that there were 500 kilos of marihuana and 15 kilos of opium at Mendez' ranch and that Mendez had brought five kilos of opium to Uruapan to show that group that the narcotics were available [Tr. 78, 79].

Webster, Wilson, Chappel and a Mexican narcotics agent then proceeded to a hotel room where Mendez and Medina were present [Tr. 80], Chappell requested to see the narcotics and Mendez left the room and returned with a raffia-type shopping bag which he put on the bed and from which he extracted a shoe box. Chappell looked at the contents and confirmed that it was opium then went in to brush his teeth, extracted a 38 caliber revolver from a handbag and placed Wilson, Medina and Mendez under arrest [Tr. 81]. The opium seized at that time weighed approximately two kilos [Tr. 82]. At the conclusion of this testimony Webster identified Walker in the courtroom as being the individual about whom he had testified [Tr. 83.]

Under cross-examination Webster testified that Goldheimer had given him his telephone number while they were in jail together in Long Beach [Tr. 84]; also re-

affirmed his testimony that when Goldheimer had shown him certain charts or maps on the yacht Pursuit he had displayed one to him and said "we have one all set up". Webster testified that he had contacted Goldheimer about a week after his release from jail at the number which Goldheimer had given him in jail [Tr. 112]. As to his discussion with Wilets, he stated that Wilets specifically instructed him to appear to go along with Goldheimer "but not to lead him". He was told to contact Goldheimer but was instructed to "let them make the first move" [Tr. 112-113]. He reaffirmed his testimony on direct that whenever he was together with Goldheimer and Walker the conversation was generally about narcotics even at the first meeting which he had with Walker [Tr. 117]; and that at their first meeting during a discussion of narcotics, marihuana was present in Walker's automobile and Walker and Goldheimer were smoking marihuana cigarettes [Tr. 119]. Webster stated that he was told by agent Wilets after he had described the conversations which he had with Goldheimer and Walker that "if there is a conspiracy I am to go along with it; but that I wasn't to attempt to build a case" [Tr. 138].

Donald P. Wilets testified that he had been an agent with the Federal Bureau of Narcotics for three years [Tr. 161]; identified Walker and Goldheimer in the courtroom [Tr. 164] and testified that he first saw them on June 23, 1960, and first met Goldheimer on July 13, 1960, at the Scandia Restaurant when he was introduced to him by Webster [Tr. 165]. After dinner Goldheimer explained to Wilets the connections which he had in Mexico and his idea for bringing narcotics from Mexico into the United States. Wilets represented

himself to Goldheimer as a well-to-do individual who was acquainted with the narcotics traffic and Goldheimer told Wilets that he had a friend in Mexico with whom he had dealt before and who was acquainted with narcotics sources in Mexico and had narcotics readily available and that the proposed plan was to bring 200-400 kilograms of marihuana back from Guadalajara to a point near Ensenada where the narcotics would be loaded on a boat which would sail to the United States [Tr. 170, 171]. Walker's name was brought into the conversation several times concerning his part in taking care of the boat and handling the details of getting the boat to Ensenada [Tr. 172]. Wilets indicated that he was willing to back Webster [Tr. 173]. When Wilets asked Goldheimer if he wanted any money "out front" Goldheimer stated that he was well financed and didn't need it [Tr. 174].

On July 14, 1960, Wilets and Webster met Goldheimer and Walker at a place called the Palms Bar [Tr. 176]. The four individuals left the bar and drove in Wilets' car and during a discussion pertaining to the proposed operations, Walker asked Wilets if he was going to front any money on the operation to which Wilets replied that he would pay for the narcotics only when they were delivered in the United States and he would put no money out across the border [Tr. 182]. Wilets testified that he told Webster over the phone when Webster called him from Guadalajara that Webster was to call him often but that he was "to let Goldheimer lead, not to try to take over himself" [Tr. 180]. While walking out to the plane at the airport Goldheimer asked Wilets if he could use any opium, any "mud", and Wilets replied that he

would see what he could do to get rid of opium for him [Tr. 191]. During the drive back from the airport upon the return of Webster and Goldheimer from Mexico, Goldheimer discussed the purchase of the kilo of heroin and told Wilets that the heroin would be available from either the 8th or 14th through the 21st and that the kilo would be waiting in Guadalajara and that he wanted to make the purchase at one time together with the marihuana [Tr. 193.] Goldheimer also explained in detail the procedure in the Mexican jail and how they had been able to get in to see Talaveras and Ramundo. Before leaving the car to go to his apartment, Goldheimer told Wilets that he could consummate the deal within fifteen days [Tr. 195]. Wilets testified that an electronic recording device had been installed in the car and that the entire conversation during the car ride had been recorded on tape. These tapes were identified as Exhibits 1A, 1B and 1C and were later introduced into evidence [Tr. 199]. The next meeting with Goldheimer and Walker occurred on August 10, 1960, at the Pancake Parade Restaurant [Tr. 199]. They left the restaurant and entered Wilets' car and discussed the transactions while driving around. Goldheimer stated that he would not be able to leave for Mexico until the 22nd at the earliest because of a court appearance but he was against Wilets and Webster leaving and going down there without him because he said that Bryce Wilson might not deal with them [Tr. 202]. Goldheimer stated that he had "made all the connec-

tions" and that Wilson was his personal friend and that he wanted to be down there when any transactions took place or any business was taken care of [Tr. 203]. Walker stated that the boat which he had originally planned to use was not available and that he would have to go out and charter a boat but that he was short of funds and needed approximately $250.00 to handle the chartering fees [Tr. 205] and he told Wilets that he wanted the narcotics water proofed but not weighted because he didn't expect any trouble but the narcotics might get wet from the normal sailing of the boat [Tr. 206].

At the time the foregoing discussions were conducted in Wilets' car they were being recorded on a tape recorder which Wilets had placed in the car. The recordings were identified and introduced into evidence as Government's Exhibits 2A, 2B and 2C [Tr. 210]. On September 5, 1960, Wilets met Goldheimer in a restaurant by pre-arrangement and he intended to place Goldheimer and Walker under arrest at that time but Walker was not with Goldheimer and Goldheimer explained that he had not been able to contact Walker who was working on the Pursuit at a boat repair dock [Tr. 211]. Wilets did not place Goldheimer under arrest on that day but on September 9 he met with Goldheimer and Walker in Goldheimer's apartment at the Normandy Village Apartments in Hollywood where he told Goldheimer and Walker that the narcotics had been moved to Ensenada and sent Tingy, another agent who accompanied Wilets to Goldheimer's apart-

ment, out to get the map supposedly showing the location of the narcotics [Tr. 212]. Tingy returned to the apartment with several other agents and Walker and Goldheimer were placed under arrest [Tr. 213].

On cross-examination Wilets stated that Webster related Goldheimer's scheme to him on June 4, 1960, and asked if he were interested in Webster's following through on the scheme to which he replied in the affirmative [Tr. 218-219]. Wilets explained that the reason he did not meet Goldheimer until July 13 at Scandia was that he requested Webster to find out the name of the second participant involved [Tr. 219]. Wilets again explained the plan which Goldheimer submitted to him at the Scandia Restaurant at the first meeting which was that Wilson, a friend of Goldheimer's, would be able to supply about 200 kilos of marihuana and that Goldheimer intended to go down to get the marihuana, drive it to the vicinity of Ensenada from which point the narcotics would be loaded on a boat to be sailed back to Newport Harbor by Walker [Tr. 225-226]. Wilets stated that at the meeting at the Palms Cafe on July 14 with Walker and Goldheimer there was no mention of any financing but during the ride in the car after leaving the restaurant, Walker asked him if he was going to front any money on the operation to which Wilets replied that he would not give any money until the narcotics were in the United States [Tr. 227-228]; and that on the evening of August 10 at the Pancake Parade Restaurant in

Long Beach he requested $250.00 for funds for chartering a boat [Tr. 229-230]. Wilets stated that Goldheimer and not Webster had proposed the trip to Mexico [Tr. 240].

Howard W. Chappell testified that he had been an agent of the Federal Bureau of Narcotics for thirteen years and was presently in charge of the Los Angeles office [Tr. 262-263]; that he arrived in Guadalajara August 19, 1960 [Tr. 263]; that he was introduced to Wilson by Webster in Guadalajara [Tr. 266]; and that Wilson stated to him that the weed was set to go but that they couldn't get the heroin because the people got rid of the heroin and they'd have to wait a week or so for them to convert some more [Tr. 267]. Wilson stated that the marihuana could be ready tomorrow or at the latest in 48 hours and asked where Goldheimer was to which Chappell replied that Goldheimer had to be in trial on the following day and couldn't come down. Wilson asked "Well is Walker going to have the boat at Ensenada?" [Tr. 268]. Chappell replied that all arrangements were made and that as soon as he had seen and had possession of the stuff he would call Los Angeles and the boat would leave for Ensenada. Arrangements were made to go to a suburb of Guadalajara called Tlaquepaque the following morning where an attempt was made to locate Nicolas Medina but he could not be located there so Wilson and Chappell went to Puerto Vallarta on August 23 [Tr. 272]. Wilson had stated to Chappell

that he knew Walker fairly well and that he had met him the previous year when the Pursuit had made a trip to Ensenada [Tr. 273]. They returned to Guadalajara on August 24 where they met Medina [Tr. 274]. Medina told Chappell that the price of heroin was $12,000 instead of the $10,000 originally quoted and said that they would have to wait until they brought the opium down from the mountains and converted it into heroin before they could get it but that the marihuana could be available immediately [Tr. 275]. On the next day, August 25, 1960, Chappell and Wilson again met with Medina and Francisco Ochoa Mendez in a motel in Guadalajara [Tr. 276]. Mendez was introduced as the grower of the opium and there was a discussion about the price and where the narcotics would be delivered; Chappell wanted it delivered in Guadalajara but Mendez insisted that delivery should be made in a village called Uruapan which was about 300 miles away [Tr. 277]. It was finally agreed that Wilson would go with Mendez to Uruapan and when they had the marihuana and opium all loaded in the truck to call Chappell in Guadalajara where he would meet Mendez and pay the money. Wilson went to Uruapan with Mendez and on the 29th of August Chappell received the call and proceeded to travel to Uruapan by automobile with Webster and two Mexican narcotics agents [Tr. 278-279]. Upon arriving in Uruapan they met Bryce Wilson who told them that Mendez and Medina were in a hotel in town [Tr. 280]. Wilson went to the hotel to join Medina and Mendez and some

time later they were joined by Chappell who asked to see a sample of the opium [Tr. 281]. Mendez went out to get the sample and he showed it to Chappell upon his return [Tr. 282] at which time Chappell took a pistol out of his bag and arrested Mendez, Medina and Wilson [Tr. 283].

Eugene Duvalcourt Walker testified in his own defense and admitted that he might have discussed with Goldheimer the laxness in customs inspection for private yachts returning from Mexico [Tr. 312]; that he joined in a conversation regarding narcotics with Goldheimer and Webster at the Pancake House on June 23, 1960; that he asked Wilets if he was going to put up front money or finance the operation completely and that there was a discussion of bringing marihuana and heroin into the United States during a car ride from the Pancake House Restaurant [Tr. 338]. He also admitted that there was a discussion of a trip to Mexico to secure knowledge of where narcotics could be obtained and in what quantity on July 14 in the vicinity of the Palms Restaurant [Tr. 341]; that Bryce Wilson was mentioned as a source or contact man in that connection [Tr. 342]; and that he may have met Wilson in Yalapa after his return from Acapulco some time before [Tr. 342]. Walker also admitted that prior to August 10 he had made inquiries about boats that would be available for hire and charter as he was supposed to be "getting a boat ready" for the operation but that he had not contracted for one up to that time; and there was a discussion as to waterproofing

bags in which narcotics would be packed [Tr. 348] and that he had been told that he would have to go somewhere in the vicinity of Ensenada but no specific point had been mentioned [Tr. 354]. Walker stated that he knew that the plan into which he entered for importing narcotics with Webster and Goldheimer was against the law but that he agreed to enter into it because it would bring him profit [Tr. 357-358].

Irving Goldheimer testified in his own defense, denied that narcotics had been discussed with Webster in the city jail in Long Beach at their first meeting [Tr. 363-364] but admitted that it was discussed at a subsequent meeting where he told Webster that he had been to Mexico and knew a few people down there [Tr. 371, 372, 374]. Goldheimer also stated that after he reached Guadalajara with Webster he did make an effort to find Wilson and that he located him in Puerto Vallarta [Tr. 381]. Goldheimer stated that there had been a discussion with Webster and Wilets about the method of transporting narcotics from Guadalajara to Los Angeles at the time he was being driven back in Wilets' automobile from the airport on his return to Los Angeles from Mexico [Tr. 387-389].

At the conclusion of Goldheimer's testimony both sides rested and at the next session of court the jury was instructed and retired [Tr. 405-436]. It should be noted that the Court inquired of both sides as to whether they were satisfied with the instructions and both sides stated that they were satisfied to have the case submitted on the instructions as just given by the Court [Tr. 436].

IV.
STATEMENT OF QUESTIONS PRESENTED.

Appellants submitted two separate opening briefs but an analysis of their contents indicates that there are several questions raised and arguments made which are common to both briefs and that the Walker brief raises certain additional matters that are not touched upon in the Goldheimer brief.

The following arguments are made in both briefs and in essentially similar fashion:

(1) The appellants were unlawfully entrapped into committing the crimes of which they were convicted and the court should so have held as a matter of law;

(2) The court committed error during its instructions in its comment on the law relating to entrapment and the appellants were denied a fair trial as a result thereof;

(3) The court erred in admitting the testimony of Agent Chappell concerning his activities in Mexico.

The following additional arguments are made by appellant Walker:

(1) the evidence was insufficient to establish his guilt;

(2) the court committed error in refusing to consider a juror's affidavit in connection with his motion for a new trial.

The five matters summarized above will be discussed in their respective order in V *infra*.

V.
ARGUMENT.

A. The Evidence Does Not Indicate That There Was Entrapment as a Matter of Law and the Trial Court Properly Submitted the Question of Entrapment to the Jury for Its Consideration.

Appellants rely primarily on the opinions in two leading Supreme Court cases[2] to support their argument.

The Government supports the guiding principles of the law of entrapment as set out in those opinions; our disagreement with the appellants—"the parting of the ways"—concerns the appropriateness of their application to the instant case.

The *Sorrells* case sets forth the general considerations to be employed in all cases where entrapment is in issue. The Court there said:[3]

> "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. (Citing cases). The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic . . . and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with

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[2]*Sorrells v. United States*, 287 U. S. 435 (1935); *Sherman v. United States*, 356 U. S. 369 (1958).

[3]*Sorrells supra* at p. 442.

> the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute".

In *Sorrells* the Supreme Court reversed the conviction holding that the District Court was in error in "holding that as a matter of law there was no entrapment and in refusing to submit the issue to the jury" (*supra,* p. 452).

Here, the trial court did submit the issue to the jury under the principles enunciated in *Sorrells* and it is submitted that an analysis of the record, here, as made below, indicates that *Sorrells* serves to support this submission and the subsequent determination of the jury.

As to *Sherman supra,* it is apparent that the decision therein that the trial court should have held entrapment present as a matter of law, does not have application here because the circumstances, in the two cases are so radically different. Rather the case which does parallel the instant case, one which bears a striking similarity in its facts and is therefore more applicable is the *Masciale* case,[4] which was decided by the Supreme Court on the same day as the *Sherman* case.

In the instant case there were no attempts on the part of the appellants to avoid the issue of narcotics, no repeated refusals to discuss narcotics, no appeals to sympathy by one supposed addict (the informer) to another (the defendant) who was attempting to cure himself of the habit and no gradual wearing down of the

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[4]*Masciale v. United States,* 356 U. S. 386 (1958).

defendant's resistance, all of which occurred in *Sherman.* As the court stated there, in holding that entrapment was established as a matter of law, it was not choosing between conflicting witnesses, nor judging credibility; but it was reaching its conclusion from the undisputed testimony of the prosecution's witnesses.

Contrast the situation in *Sherman* with that present in the instant case and in *Masciale, supra.* Here, as in *Masciale,* at least one of the appellants, Goldheimer, was acquainted with the special employee without knowledge that he was working as an undercover agent [Tr. 5, 11]. Also in both cases, the Government agent (Wilets in this case, an individual named Marshall in Masciale) was introduced as a big money man interested in talking about and buying very large quantities of high grade narcotics [Tr. 165, 170, 171]. Here, as also in *Masciale,* the appellants could have withdrawn from the conversations and refused to conduct any further meetings with the special employee or with the Government agent but instead of withdrawing, the appellants had additional meetings [Tr. 176, 193], and further conversations in which one of the appellants, Goldheimer, discussed his "contacts" in Mexico and his plan to smuggle the narcotics into the United States [Tr. 170-171] and the other appellant, Walker, agreed to accept his position in the conspiracy as the water transportation specialist who could set forth the manner in which the narcotics should be packed and where it would be stored during the voyage [Tr. 199] and even requested funds from one of the others who was supposed to participate so that he could have some money to charter a boat for the illegal expedition [Tr. 205, 206].

On the facts in the record, where did the "criminal design" originate? Was it the Government employees or appellant Goldheimer who had the "contacts," co-conspirator Bryce Wilson and other in Mexico, who knew in what town to find Wilson and who had money on deposit with him in Mexico and who evolved the plan—the way the "Hollywood people" do it—to smuggle the narcotics into the United States? And was it the Government agents or appellant Goldheimer who knew of the sailing abilities of Walker and induced Walker to join the conspiracy? And was it not Walker who because of his observation of the laxness of customs officials in inspecting private pleasure vessels, conceived a plan of smuggling narcotics into the United States by wrapping them in water proof bags and placing them in the sailing bags of such vessels [Tr. 205-206]? The record indicates that Walker volunteered to further study the customs procedures so that the plan would be fool proof [Tr. 26].

The appellants testified on their own behalf but it is submitted that a review of the record indicates that the trial court had sufficient justification for concluding that entrapment was not established as a matter of law but that it should be presented as a question of fact for determination by the jury.[5]

This court has repeatedly decided, in accordance with the holding in *Masciale supra,* that when the issue of entrapment is present and there is conflicting testimony and credibility factors involved, the trial court properly fulfills its function, when as in this case, it

[5]It should be noted that many of these prosecution conversations were recorded and admitted into evidence as Exhibits 1 and 2.

submits the matter to a jury; and that after it does so, the jury is entitled to disbelieve the evidence offered by the defense, find that the "criminal design" originated with the defendant or defendants and thus find for the Government on the issue of the defendants' guilt, as it did here.

See:

Matthews v. United States, 290 F. 2d 198 (1961);

Young v. United States, 286 F. 2d 13 (1960);

Hattem v. United States, 283 F. 2d 339 (1960);

Cellino v. United States, 276 F. 2d 941 (1960);

Bruno v. United States, 259 F. 2d 881 (1948).

B. The Court's Instructions on Entrapment Did Not Deprive the Appellants of a Fair Trial.

Appellants now complain of some of the language in the trial court's instructions concerning entrapment, but it should be noted that no exceptions were taken to any of the instructions before the jury retired for its deliberations.

Rule 30, Title 18, Federal Rules of Criminal Procedure, provides in pertinent part as follows:

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. . . ."

In this case after the trial court had instructed the jury [Tr. 405-437], the Court inquired of the appellants whether there were any matters which either side

wished to take up before the jury finally retired to deliberate on the verdict and whether the appellants were satisfied to have the case submitted at that time, and the appellants replied that they had no further matters to take up and that they were satisfied to have the case submitted at that time [Tr. 436].

It would seem therefore that because of their failure to take exception at the time, the appellants are now barred by the operation of Rule 30, *supra,* from objecting to any portion of the Court's instructions.

It should be noted that the rule was designed to permit the trial court to correct any instructions if erroneous and thus to obviate the necessity for a new trial, and thus if appropriate and seasonable objection had been made, the court could have told the jury to disregard or further explain the comments to which the appellants now object.

See:

Federick v. United States, 163 F. 2d 536, 19th Cir. (1947), cert. den., 332 U. S. 775 (1947).

The appellants do not invoke the "plain error" rule,[6] but it should be noted that even if the court's instructions were to be re-examined they should be re-examined in their entirety—words or phrases should not be examined piecemeal or in isolation (see *Johnson v. United States,* 291 F. 2d 150 (8th Cir. 1961), and that when the entire instruction concerning the law of entrapment is so examined [Tr. 426-430], it is couched in the guiding principle of the *Sorrells* case, *supra,* and results in no prejudice to the appellants.

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[6]Title 18, Federal Rules of Criminal Procedure, Rule 52(b).

C. The Testimony of Agent Chappell Was Properly Admitted Into Evidence.

It would appear that two questions are involved concerning the admissibility of testimony of Agent Chappell [Tr. 262-287], as raised by the appellants; one concerns the time of the occurrences related by the witness, the other as to the occurrences themselves.

First, as to the matter of time—it should be noted that Chappell's testimony concerned events which terminated on August 29, 1960, with the arrest of three of the unindicted co-conspirators, Bryce Wilson, the American living in Mexico, and the two Mexican nationals, Medina and Mendez [Tr. 283]. It should be noted further that the indictment alleges a conspiracy which continued to August 30, 1960, so that all of Chappell's testimony relates to a period covered by the indictment. It should further be noted that the evidence does not indicate that the appellants had withdrawn from the conspiracy or that the conspiracy had terminated by August 29, 1960—contrarywise, on September 5, 1960, appellant Goldheimer met with Wilets in Los Angeles to discuss the status of the operation [Tr. 211] and four days later on September 9, 1960, the day of their arrest, appellants Goldheimer and Walker met with Wilets to discuss and plan the final phase of the operation [Tr. 212-213], still unaware of course that Wilets was a federal officer.

It is apparent therefore that the time on which the events testified to by Chappell occurred, offered no bar to their reception into evidence.

Now, as to the testimony itself: It should be noted that before permitting Chappell to testify, the Court instructed the jury as to the pertinent law relating to

a conspiracy [Tr. 265], and in its charge gave additional detailed instructions relating to conspiracies [Tr. 421-428].

It is well settled of course, that every act or declaration of each member of a conspiracy in furtherance thereof, and while the conspiracy is in operation, is considered the act of declaration of each member of that conspiracy. See *Barnett v. United States,* 171 F. 2d 721 (9th Cir. 1949).

If we examine the testimony of Chappell, we discover that he was introduced to one of the co-conspirators (Wilson) in Guadalajara [Tr. 266] and that from that point on the testimony concerns mainly admissions and declarations made by Wilson or the other unindicted co-conspirators to him concerning the operation for which the conspiracy was formed. For example, that the weed was set to go, etc. [Tr. 267], when the marihuana would be ready and the activities of Walker and Goldheimer [Tr. 268], arrangements to go to another town for a meeting with the Mexican members of the conspiracy [Tr. 272]. From that meeting until the arrests, Chappell's testimony is concerned almost entirely with the actions and declarations of the Mexican co-conspirators in addition to those of Wilson [Tr. 278-283, *Passim* ....].

In line therefore with the admonition by the Court and the instructions relating to the law of conspiracy it was proper to admit the Chappell testimony so that the jury could consider the actions and declarations of the co-conspirators, only after a finding by it of course that a conspiracy did in fact exist. (See the Court's instructions relating to formation of a conspiracy and effect to be accorded to acts and declarations of those

found to be members thereof [Tr. 423-424] and see *Sanchez v. United States,* 293 F. 2d 239, 244 (9th Cir. 1956).

D. The Evidence Was Sufficient to Support a Finding of Guilt as to Appellant Walker.

A review of the record indicates that appellant Walker was actively interested in participating in the plan to smuggle narcotics into the United States; that he was to perform one of the vital functions in the conspiracy, that of providing the transportation and transporting the narcotics into the United States and that he at no time withdrew from his participation in the conspiracy (see transcript references *re* appellant Walker in section A *supra* relating to the entrapment issue).

It is apparent therefore that there was sufficient evidence to submit to the jury concerning Walker's participation and role in the conspiracy and it is well settled that on review, the evidence must be viewed in the light most favorable to support the judgment. See *Glasser v. United States,* 315 U. S. 60 (1941).[7]

E. The Court Correctly Refused to Consider a Juror's Affidavit in Connection With the Application of Appellant Walker for a New Trial.

The general rule in the federal courts is that testimony of a juror may not be received to prove misconduct by himself or his colleague in reaching a verdict.

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[7]Actually appellant Walker in his brief at p. 27 admits that he entered into a "purported conspiracy to import narcotics into the United States" but again makes a claim of entrapment so that this point is actually a repetition of his argument outlined in A *supra.*

Jordan v. United States, 87 F. 2d 64 (D. C. Cir. 1936) and *Rotondo v. Isthmian Steamship Lines,* 243 F. 2d 581 (2nd Cir. 1957), are two cases in which this was held to be the rule in circumstances just as in the instant case where allegations were made that the jury failed to follow the Court's instructions in arriving at its verdict.

In the *Rotondo* case *supra,* at page 583, in a *per curiam* opinion by a court composed of Judges Hand, Medina and Waterman, there appears this statement of the law:

> "The motion wholly misconceives the law relating to this subject. There have indeed been cases where the Court has set aside a verdict because evidence was brought before the jury *outside of court* (emphasis supplied). Mattox v. United States, 146 U. S. 140, 13 S. Ct. 50, 36 L. Ed. 917 is the leading decision upon that point. *However it is completely well settled that when objection rests upon the jurors' testimony as to what were the reasons that in fact induced them to find their verdict, the court will not hear them."* (Emphasis supplied.)[8]
>
> That is not indeed because the verdict would or could survive the facts if they were disclosed; but because the law will not permit a decision to be

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[8]In its footnote at this point, the court cites the following cases, thusly: *"Hyde v. United States,* 225 U. S. 347, 383, 384, 32 S. Ct. 793, 56 L. Ed. 1114; *Clark v. United States,* 289 U. S. 118, 53 S. Ct. 465, 77 L. Ed. 993; *Stein v. People of the State of New York,* 346 U. S. 156, 178, 73 S. Ct. 1077, 97 L. Ed. 1522; *Jorgensen v. York Ice Machinery Corp.,* 2 Cir., 160 F. 2d 432, 435; Wigmore § 2349."

reopened to which all have assented. Wigmore likens the situation to that that refuses to consider parol evidence to vary a written instrument.

In *Stein v. New York* (cited in footnote 8 *supra*) the Supreme Court stated, at page 178:

> "Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned lest it operate to intimidate and harass them. This court will not accept their own disclosures of forbidden quotient verdicts in damage cases, *McDonald v. Pless,* 238 U. S. 264, nor of compromises in a criminal case whereby some jurors have exchanged their convictions on one issue in return for concession by other jurors on another issue. *Hyde v. United States,* 225 U. S. 347. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference. *McDonald v. Pless, supra,* at 267-268.
>
> But the inability of a reviewing court to see what the jury has really done is inherent in jury trial of any two or more issues and departure from instruction is a risk inseparable from jury secrecy and independence. The uncertainty, while the cause of concern and dissatisfaction in the literature of the profession, does not render the customary jury practice unconstitutional."

It should be well noted at this point that the juror's affidavit which appellant Walker attempted to introduce in connection with his motion did not concern any

extrinsic matters or pressures on the jury which occurred outside of court, but were concerned with their method of deliberation, that is with an alleged misconception of the instructions of the court, which is the same matter to which the court addressed itself in *Rotondo, supra.*

In conclusion, there follows a brief, succinct statement of the law as it appears in *Jordan v. United States, supra:*

> "To set aside the verdict now on the ground of mistake on the part of the jury would we think be improper and as is often said in like circumstances, to establish a practice replete with dangerous consequences.
>
> "The universal rule in the federal courts is that the testimony of a juror may not be received to prove misconduct of himself or his colleagues in reaching a verdict." (Citing cases.)

Conclusion.

Appellee urges, that for the reasons herein discussed, the convictions of the appellants in the trial court should be affirmed.

Respectfully submitted,

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